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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FRANK JARVIS ATWOOD,

Plaintiff,

v.

DAVID SHINN, Director, Arizona
Department of Corrections, Rehabilitation
& Reentry; JAMES KIMBLE, Warden,
ASPC-Eyman; JEFF VAN WINKLE,
Warden, ASPC-Florence; LANCE
HETMER, Assistant Director for Prison
Operations, Arizona Department of
Corrections, Rehabilitation & Reentry;
MARK BRNOVICH, Attorney General of
Arizona; JOHN DOE, Arizona-licensed
Pharmacist,

Defendants.

CASE NO. 2:22-cv-00860-JAT-JZB

**MOTION FOR LEAVE TO
CONDUCT LIMITED EXPEDITED
DISCOVERY FROM DEFENDANT
JOHN DOE, ARIZONA-LICENSED
PHARMACIST**

**This is a capital case. Execution set for
10 a.m. June 8, 2022**

1 he would not accept service for John Doe because his office does not represent the
2 Pharmacist and that he was not aware of John Doe having counsel with respect to any
3 litigation. Mr. Sparks explained that the Attorney General’s Office “would be precluded
4 from providing the identity of any counsel by A.R.S. 13-757(C).” It appears however,
5 that members of the Attorney General’s office are aware of the identity and contact
6 information for the John Doe pharmacist they are using to compound the drugs to be used
7 for the lethal injection of Mr. Atwood.

8
9 7. It is respectfully requested herein, that the Attorney General be ordered to
10 either provide counsel for Mr. Atwood with the contact information for John Doe
11 (confidential to counsel all of whom would stipulate to a Protective Order) so that John
12 Doe may be served, or that this Court Order the Attorney General to serve John Doe
13 with the Summons and Complaint in this matter. This must occur no later than noon
14 Monday, May 30, 2022 and this information must be emailed to all counsel of record in
15 this matter.¹

16 **LEGAL STANDARD**

17 8. Generally, Fed. R. Civ. P. 26(d) provides that the parties may not commence
18 discovery until after the required conferral under Fed. R. Civ. P. 26(f). However, Under
19 Rule 26(d), “A court may grant expedited discovery on a showing of good cause.” *Fornix*
20 *Holdings LLC v. Unknown Party*, No. CV-22-00494-PHX-DLR, 2022 WL 992546, at *2
21 (D. Ariz. Apr. 1, 2022). The District of Arizona held that ““Good cause may be found
22

23
24 ¹ Counsel realizes this is a holiday, however on information and belief, this information is readily available to
counsel for the Defendants and can easily be done with a simple email. Given the urgency of this matter, there
should be no need for further delay.

1 where the need for expedited discovery, in consideration of the administration of justice,
2 outweighs the prejudice to the responding party.” *Breaking Glass Pictures, LLC v. Doe*,
3 No. CV-13-00599-PHX-GMS, 2013 WL 3805637, at *4 (D. Ariz. July 22, 2013)
4 (quoting *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276
5 (N.D.Cal.2002)). Requests for expedited discovery must be “limited” in scope and
6 “narrowly tailored” to the relief needed. *Avaya, Inc. v. Acumen Telecom Corp*, No. 10-
7 cv-03075-CMA-BNB, 2011 U.S. Dist. LEXIS 1635, at *6 (D. Colo. Jan. 3, 2011).

8
9 9. An order granting leave for a plaintiff to conduct expedited discovery may
10 be appropriate when a plaintiff seeks to sue unnamed defendants but through his own
11 efforts is unable to identify the defendants to be sued. When “situations arise, such as the
12 present, where the identity of alleged defendants will not be known prior to the filing of
13 a complaint,” the “plaintiff should be given an opportunity through discovery to identify
14 the unknown defendants, unless it is clear that discovery would not uncover the identities,
15 or that the complaint would be dismissed on other grounds.” *Gillespie v. Civiletti*, 629
16 F.2d 637, 642 (9th Cir. 1980).

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18 10. District courts “routinely allow early discovery to enable plaintiffs to identify
19 ‘Doe’ defendants.” *Voltage Pictures, LLC v. Unknown Party*, No. CV-13-728-PHX-
20 SMM, 2013 WL 12174691, at *1 (D. Ariz. July 15, 2013) (citing *Wakefield v. Thompson*,
21 177 F.3d 1160, 1163 (9th Cir. 1999)). For example, in *Best W. Int'l, Inc. v. Doe*, No. CV-
22 06-1537-PHX-DGC, 2006 WL 2091695, at *1 (D. Ariz. July 25, 2006), the District of
23 Arizona found that “BWI has satisfied the good cause requirement. BWI has established
24 by affidavit that it is unable to identify the John Doe Defendants by means other than the

1 subpoenaed.” In *Malibu Media, LLC v. John Does 1-23*, No. 12-cv-00836-MSK-KMT,
2 2012 U.S. Dist. LEXIS 48107, at *4 (D. Colo. April 4, 2012), the court granted expedited
3 discovery to ascertain the identities of the John Doe defendants because the “[p]laintiff
4 reasonably believe[d] that there [were] no practical methods to discover [d]efendants’
5 identities without court-ordered discovery,” and thus “it appear[ed] likely that [the]
6 [p]laintiff [would] be thwarted in its attempts to identify [the] [d]efendants without the
7 benefit of formal discovery mechanisms.” The *Malibu Media* court cited with approval
8 *Arista Records, LLC v. John Does 1-19*, in which the plaintiffs were found to have “set
9 forth good cause for expedited discovery because the ‘[d]efendants must be identified
10 before [the] suit [could] progress further.’” *Id.* at *3 (quoting *Arista Records*, 551 F.
11 Supp. 2d 1, 6 (D.D.C. 2008)); *see also, e.g., Clear Skies Nev., LLC v. Doe*, No. 15-cv-
12 02739-WYD-MEH, 2015 U.S. Dist. LEXIS 170148, at *2 (D. Colo. Dec. 21, 2015); *FX*
13 *Audio Software, Inc. v. Doe*, No. 13-cv-02242-WYD-MEH, 2013 U.S. Dist. LEXIS
14 120947, at *2 (D. Colo. Aug. 26, 2013); *Sunlust Pictures, LLC v. Doe*, No. 12-cv-00656-
15 CMA-KMT, 2012 U.S. Dist. LEXIS 39026, *3-4 (D. Colo. March 22, 2012); *20/20 Fin.*
16 *Consulting, Inc. v. Does*, No. 10-cv-01006-CMA-KMT, 2010 U.S. Dist. LEXIS 55343,
17 *3-4 (D. Colo. May 11, 2010).

18
19 11. In *Malibu Media*, the court found that the plaintiff reasonably believed that
20 “without [identifying] information, it [could not] serve defendants nor pursue this
21 lawsuit.” 2012 LEXIS 48107 at *2. The same is true here. Plaintiff is unable to serve
22 Defendant John Doe until he learns his full name; such identifying information is in the
23 sole possession and control of the Arizona Department of Corrections, Rehabilitation and
24

1 Reentry.

2 12. Plaintiff can thus demonstrate good cause justifying an order for leave to
3 serve the attached limited expedited discovery for the purpose of identifying, and
4 ultimately serving, this two Defendants, as well as amending the Complaint to reflect his
5 full names. *See* Ex. 1, Plaintiff’s Proposed Expedited Discovery Requests. Plaintiff’s
6 request for expedited discovery is “limited in scope” and “narrowly tailored” to its
7 purpose because it is strictly limited to requests seeking information and/or records that
8 would identify John Doe’s actual name. *Avaya, Inc.*, 2011 U.S. Dist. LEXIS 1635, at *6.
9 Plaintiff reasonably believes that without court-ordered discovery, there are no other
10 “practical methods to discover” the defendant’s identity. *Malibu Media*, 2012 U.S. Dist.
11 LEXIS 48107, at *4. For Plaintiff’s claims against Defendant John Doe to “progress
12 further,” his actual name “must be identified.” *Arista Records*, 551 F. Supp. 2d at 6.

14 CERTIFICATE OF CONFERRAL

15 13. Upon consultation with opposing counsel, Jeffrey Sparks has informed
16 counsel for Mr. Atwood that they oppose this motion.

17 Respectfully submitted, this the 26th day of May, 2022,

18
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FRANK JARVIS ATWOOD,

Plaintiff,

v.

DAVID SHINN, Director, Arizona
Department of Corrections, Rehabilitation
& Reentry; JAMES KIMBLE, Warden,
ASPC-Eyman; JEFF VAN WINKLE,
Warden, ASPC-Florence; LANCE
HETMER, Assistant Director for Prison
Operations, Arizona Department of
Corrections, Rehabilitation & Reentry;
MARK BRNOVICH, Attorney General of
Arizona; JOHN DOE, Arizona-licensed
Pharmacist,

Defendants.

CASE NO. 2:22-cv-00860-JAT-JZB

**PLAINTIFF’S EXPEDITED SET
OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION
FROM DEFENDANT DAVID
SHINN, IN HIS OFFICIAL
CAPACITY**

**This is a capital case. Execution set for
10 a.m. June 8, 2022**

1. Plaintiff Frank Atwood by and through his counsel, hereby submits the following Expedited Set of Interrogatories and Requests for Production of Documents to Defendant David Shinn, Director of the Arizona Department of Corrections, Rehabilitation & Reentry, in his official capacity, to be answered in writing, under oath, and to produce the documents requested by noon, May 30, 2022, pursuant to Rules 6, 26, 33, 34, and 36 of the Federal Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

2. “You,” “your,” and “Defendant,” means Defendant David Shinn in his official capacity. This includes but is not limited to agents, representatives,

1 employees, contractors, servants, and all other persons acting on behalf of or
2 representing Defendant, including Defendant's attorneys.

3 3. In answering these discovery requests, you shall furnish all such
4 information as is available or known to you and your representatives and agents,
5 including your attorneys, unless such information is claimed to be privileged from
6 discovery. Should you claim privilege, set forth in detail in your answers hereto the
7 grounds for such claim and the general nature of the information as to which you claim
8 a privilege.

9
10 4. **Confidentiality:** Whenever in these requests there is a request for a
11 response and/or a request to produce a document to which Defendant alleges
12 confidentiality and, which therefore, may be subject to the terms of a Stipulated
13 Protective Order, Defendant is to so indicate in his or her responsive pleading and
14 produce the response and/or document along with a clear designation of the proposed
15 confidentiality.

16 5. As used herein, the term "document(s)" means: all manner of
17 written, typewritten, printed or recorded material whatsoever, including any graphic,
18 mechanical or oral records or recordings of any kind, correspondence, letters,
19 memoranda, records of meeting or conferences, agreements, reports, statements,
20 personnel or personnel-type files, summaries, drafts, interoffice and intraoffice
21 communications, electronic mail, offers, notes of conversations, records of phone calls
22 or meetings, summaries, and printed matter.

23
24 6. Whenever in these requests there is a request to provide or state the

1 identity of a person, provide as to each such person the following information:

- 2 a. His, her or its name;
- 3 b. His, her or its present or last known address and telephone number;
- 4 c. His, her or its present business address, business telephone, name of
- 5 employer, and job title.

6 7. In the event you withhold from identification any document as

7 privileged, you are requested to provide a list of the documents withheld and state the

8 following information with respect to each document withheld:

- 9 a. The date appearing on the document and, if it has no date, the date, or
- 10 approximate date, on which it was prepared;
- 11 b. The title or label of the document;
- 12 c. The name and current address of the person(s) who signed the document or,
- 13 if it was not signed, the name and current address of the person(s) who
- 14 prepared it;
- 15 d. The name and current address of the person(s) to whom the document was
- 16 directed and the person(s) to whom a copy of the document was directed;
- 17 e. A general description of the subject matter(s) to which the document
- 18 relates;
- 19 f. The grounds on which the document has been withheld.

20 8. If you know that any document(s) falling within the scope of these

21 requests has been destroyed or lost, redacted or altered in some way from its original

22 form, or is unavailable for any reason, you are requested to produce a written list of any

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1 such document(s), identifying each document as follows:

- 2 a. The date;
- 3 b. The request(s) the document pertains to;
- 4 c. The addresser's or author's name, title and address;
- 5 d. The addressee's or recipient's name, title and address;
- 6 e. The name and address of every other person to whom the document was
- 7 sent or shown;
- 8 f. The subject matter of the document;
- 9 g. The general character of the document;
- 10
- 11 h. As nearly as possible, the exact content (or original content before redacted
- 12 or altered) of the document; and
- 13 i. The reason for its destruction, alteration or redaction, or unavailability.

14 9. Documents that you are to produce in response to these requests
15 shall be produced electronically not later than noon, Monday, May 30, 2022 and sent to
16 the email addresses of all counsel of record in this matter.

17 10. Each request is continuing. As required by the Rules of Civil
18 Procedure if subsequent to serving a response to any request, Defendant obtains or
19 becomes aware of any further information relating thereto, Defendant is required to
20 amend or supplement the response thereto, setting forth such additional information and
21 producing any and all documents related thereto but not previously produced.
22

23
24 **INTERROGATORIES**

1 **INTERROGATORY NO. 1:** Please identify the pharmacist that the
2 Arizona Department of Corrections, Rehabilitation, and Reentry retained to conduct
3 pharmaceutical compounding of pentobarbital sodium solution for use in executions,
4 including the execution of Plaintiff that is scheduled to be carried out on June 8, 2022.
5 Responsive information should include the pharmacist’s full name; job title and
6 description and dates of contract/employment; and last known contact information
7 including physical office address, email address and phone number.
8

9 **REQUESTS FOR PRODUCTION OF DOCUMENTS**

10 **DOCUMENT REQUEST NO. 1:** Please produce any and all
11 employment- or personnel-type documents pertaining to this pharmacist’s
12 contract/employment history with the Arizona Department of Corrections,
13 Rehabilitation and Reentry. Responsive information should include the pharmacist’s
14 full name; job title and description and dates of employment; and last known contact
15 information.
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17 Respectfully submitted, this the 26th day of May, 2022,

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